United Nations AT/DEC/1128

Administrative Tribunal

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30 September 2003
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ADMINISTRATIVE TRIBUNAL

Judgement No. 1128

Case No. 1239: BANERJEE Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Julio Barboza, President; Mr. Kevin Haugh, Vice-President; Ms. Jacqueline Scott;

Whereas, on 25 January 2002, Somendu Banerjee a former staff member of the United Nations Development Programme (hereinafter referred to as UNDP), filed an Application requesting the Tribunal:

"7. ...

(c) *to decide* to hold oral proceedings ...

(d) *to order* the Respondent to produce ... records from UNDP ...

8. On the merits ...

(a) *to rescind* the decision of the Secretary-General dated 16 November 2001...

(b) *to find and rule* that the Joint Appeals Board [JAB] ... erred as a matter of justice and equity in failing to recommend the Applicant's reinstatement ... and to recommend the award of appropriate and adequate compensation for the consequential harm done to the Applicant including lost employment, monetary losses and mental anguish as well for the violation of his rights ...

(c) *to find and rule* that the decision of the Under-Secretary-General for Management ... was tainted by bias and prejudice,

based on factually incorrect assumptions, and constituted a gross miscarriage of justice and abuse of authority;

(d) *to order* that the Applicant be reinstated ...

(f) *to fix* ... the amount of compensation to be paid in lieu of specific performance at [39] months of gross salary with corresponding allowances and benefits ...

(g) *to award* ... as cost ... $15,000.00 in legal fees and $500.00 in expenses and disbursements."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 4 June 2002 and once thereafter until 31 August 2002;

Whereas the Respondent filed his Answer on 28 August 2002;

Whereas the Applicant filed Written Observations on 31 December 2002;

Whereas, on 11 March 2003, the Respondent submitted comments on the Applicant's Written Observations, and on 28 March 2003, the Applicant responded thereto;

Whereas, on 30 May 2003, the Applicant submitted a further statement;

Whereas, on 18 July 2003, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant joined UNDP as an Assistant Personnel Officer at the P-1 level with the then Personnel Branch, New York, on 15 April 1968. On 25 July 1994, he was appointed as Deputy Assistant Administrator/Deputy Regional Director with the Regional Bureau for Arab States (RBAS). On 1 September 1994, the Applicant was appointed Acting Regional Director, RBAS, with a special post allowance (SPA) to the Assistant Secretary-General level. On 15 August 1995, the Applicant reverted to his prior position of Deputy Assistant Administrator/Deputy Regional Director, RBAS. On 4 September 1996, the Applicant was placed on "unassigned status". Following a brief assigment in Geneva in 1998, he joined the United Nations Fund for International Partnerships (UNFIP) as Acting Executive Director, from March 1998 until July 1999, when he returned to UNDP on an "unassigned post" in the Bureau of Management. On 30

June 2001, after electing to serve his three-month notice period, the Applicant was separated from service.

In January 2000, the UNDP Executive Board approved a restructuring of UNDP and a 25 per cent reduction in Headquarters staff, to be followed by a similar downsizing in the UNDP country offices. In May of 2000, UNDP promulgated the "Policies and Procedures in connection with HQ reduction", providing that all staff who were unassigned or displaced as of June 2000 be given a period of approximately 6 months to search for a suitable post.

On 1 August 2000, the Director of the Office of Human Resources, UNDP, (OHR) informed the Applicant that, given his unassigned status, he had until the end of January 2001 to find appropriate employment and that he was expected to apply for all suitable available openings. The Director, OHR, emphasized that the Applicant would have priority consideration over equally qualified candidates and that OHR would stand ready to actively assist him in locating a suitable post

On 7 August 2000, in his reply to the aforementioned letter, the Applicant expressed concern vis-a-vis the prospects of finding an appropriate UNDP post and raised "the additional consideration of not being able to accept an assignment overseas" because of visa implications and family concerns.

On 27 September 2000, the Applicant wrote to the UNDP Administrator, requesting review of the decision contained in the letter of 1 August.

On 1 November 2000, the Applicant was informed that, no appropriate position had been found for him in New York. Therefore, the Administrator proposed that he apply for field positions away from Headquarters at the Resident Coordinator/Resident Representative (RC/RR) level. UNDP was willing to assist in resolving the Applicant's visa concerns and was "prepared to contact the U.S. Mission and to explore with them the possibility of exceptional treatment in your case".

On 2 November 2000, the Applicant received a reply to his request for review of 27 September. As there had not yet been any decision regarding his contractual status or regarding a reassignment or separation action, his request was premature.

On 28 November 2000, the Applicant filed an appeal with the JAB, contesting UNDP's decision to separate him from service at the end of January 2001 unless a suitable assignment for him was identified by that time.

On 2 January 2001, he submitted a request for suspension of action on the decision to separate him from service as of 31 January 2001.

On 5 January 2001, the Applicant was advised that, for all international professional staff, the search period had been extended through 31 March 2001.

During a meeting on 31 January 2001, the Administrator offered the Applicant an interim position for 15 months: initial detail for three months as Officer-in-Charge in Cairo, followed by a 12-month assignment as Special Advisor to the Associate Administrator. On 12 February 2001, the Applicant replied that he was "ready and available", but that his acceptance of this offer was contingent on UNDP's guaranteeing him an "appropriate, regular and continuing assignment on my return to Headquarters". On 22 February 2001, the Applicant wrote to the Secretary-General, complaining that his return to work in the Organization remained effectively blocked; that the Administrator had advised him that he had been dissuaded by some unidentified members of his senior management team to place him on a post in UNDP; and, that he had no option but to decline the Administrator's offer since it required his "submission to a blatant denial of due process and slander to his professional reputation".

On 22 March 2001, the JAB adopted its report, recommending that the Applicant's request for suspension of action be granted: this request was subsequently rejected by the Secretary-General, on the grounds that any decision to terminate his permanent appointment taken in conformity with the applicable rules and procedures did not violate his rights as a staff member, much less irreparably.

Also on 22 March 2001, the Applicant was informed that the Administrator had decided to terminate his permanent appointment on 31 March 2001 under staff regulation 8.16, with three months notice. Alternatively, he was offered an agreed separation or Special Leave Without Pay (SLWOP) for a period of up to one year in order to continue his search for suitable UN system opportunities.

On 26 March 2001, the Applicant notified the Director, Office of Human Resources that he chose to serve his three-month notice period.

On 22 June 2001, the Applicant again filed a request for suspension of action with the JAB. On 26 June 2001, the Chairperson of the JAB advised the Applicant that his request was inadmissible as the Secretary-General had already made a decision on his case and, according to staff rule 111.2 (c) (iii), "the Secretary-General's decision in of suspension of action cases is not subject to appeal".

The Applicant was separated from service on 30 June 2001.

The JAB adopted its report on the merits on 24 August 2001. Its conclusions and recommendations read as follows:

> "***Conclusions and Recommendations***
>
> 50. ... [T]he Panel concluded that the decision to separate the Appellant was taken in contravention of the provisions set forth in [staff rule] 109.1 (c), as the Respondent did not fulfil [his] obligation to undertake a *bona fide* search for a suitable post for the Appellant. The Panel further concluded that the unproven allegations about the Appellant's willingness to be a team player had unduly prejudiced his chances to find a suitable post, and were a contributing factor in the termination of the Appellant's appointment.
>
> 51. Accordingly, the Panel felt that the Appellant was entitled to compensatory damages on account of the premature and improper termination of his permanent appointment, as well for the material and moral injury he has suffered. The Panel *unanimously* agreed to recommend that the Appellant be granted *three years'* net base salary for the wrongful termination of his permanent appointment, and that he be given the equivalent of three months' net base salary for the deep distress he has suffered as a result of the Respondent's mishandling of the case."

On 7 November 2001, the Under Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

> "The Secretary-General considers that the Board's findings and conclusions above are seriously flawed in law and in fact. Staff Rule 109.1(c) provides, in relevant part, that staff with permanent appointments shall be retained in preference to those on other types of appointments 'subject to the availability of suitable posts in which their services can be effectively utilized'. The explicit wording of the Rule makes it clear that the posts must be 'available' and 'suitable'; contrary to

the Board's understanding, the Rule does not require that such posts should be 'permanent'. Therefore, the Board erred when it concluded that, by not offering you a permanent post, UNDP acted in contravention to that Rule.

In accordance with Staff Rule 109.1(c), you were considered for those available posts, which were suitable, *i.e.*, for which you had the requisite qualifications. The documentation that was submitted to the Board makes it clear that the majority of the vacant D2 posts at Headquarters was not suitable for you, as you did not have the required *recent* field experience, which was the key qualification considered by the Administrator, together with geographical and gender considerations, nor did you possess the strong academic and specialized substantive experience that was required for the other available D2 posts at Headquarters. While you did have the requisite qualifications for two of the D2 posts (DGO and TCDC), in the end you were not found as qualified as the selected candidates.

The Secretary-General further points out that your unwillingness to seek and accept assignments away from Headquarters was not only a serious failure to meet your obligations as a rotational staff member in UNDP but also the reason that you did not meet the requirement of recent field experience for most of the available D2 posts. It is noted that the Board did not consider your responsibility in that regard and its focus exclusively on the posts at Headquarters is inconsistent with its earlier finding that you had no right to be posted at Headquarters. It is further noted that the Board erred in fact when it concluded that the offer that was made to you by the Administrator to serve for 3 months as OIC of the Egypt office in Cairo, followed by 12 months in a D2 Headquarters assignment could not 'be construed as sufficient or adequate efforts to find [you] a post'. On the contrary, despite the fact that you were expected to apply for senior assignments in the field; despite the fact that, as recognized by the Board, you had no right to be placed in a Headquarters position; and despite the fact that you chose not to abide by the UNDP policy on rotation, despite all of this, the Administrator made you a legitimate offer, in good faith, which was not a sham nor was it conditional. You nevertheless chose to reject this offer, which has since then been offered to, and accepted by, another staff member. In the light of the foregoing, the Secretary-General does not agree that the termination of your appointment was 'wrongful' and finds no justification for the recommendation to compensate you in the amount recommended by the Board. He has therefore decided to take no further action on your appeal."

On 23 January 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision of UNDP to proceed with the termination of his permanent appointment did not respect the requirements of the Staff Regulations

and Rules or the obligation of good faith and fair dealing in that it was improperly motivated and procedurally flawed.

2. The Respondent failed to apply in good faith the established policies for placement of staff in abolished posts with respect to the Applicant.

3. The Applicant was discriminated against in that UNDP targeted him for separation in part because of an unstated policy of trying to reduce the number of older and longer serving staff members in favour of younger and newer recruits.

4. The forced termination of the Applicant following a *pro forma* notice period, violated his acquired rights as a holder of a permanent contract.

Whereas the Respondent's principal contentions are:

1. The Applicant's termination constitutes a proper exercise of the Respondent's authority in accordance with staff regulation 9.1 (a).

2. Satisfactory and adequate efforts were undertaken to find a suitable post for the Applicant, and he received due consideration for all suitable posts available.

3. The Respondent's decision was not marred by extraneous factors.

The Tribunal, having deliberated from 3 to 25 July 2003, now pronounces the following Judgement:

I. There are two issues before the Tribunal in the present case. The first one is whether the Administration acted correctly when it ordered the displacement of the Applicant from his post as Deputy Assistant Administrator/Deputy Regional Director, RBAS to be sent to an "unassigned status". The second one is, whether all *bona fide* efforts were made to find a suitable post for him in order to avoid his separation from the service of the Organization. As will be discussed below, these two issues are closely interrelated.

II. On the first score, his separation from his post of Deputy Assistant Administrator/Deputy Regional Director, RBAS, seems abrupt and never fully justified, since he was performing his duties with very high qualifications, just as he had done in the past with other tasks that the Organization had entrusted to

him. From that post he was placed on "unassigned status", a decision that the Tribunal finds difficult to comprehend. The Applicant, in his letter of 6 June 1996, states:

> "I am very distressed to have learnt ... that a decision has been taken to replace me imminently without any commitment or evident progress towards determining my next assignment ... Despite the appearance of being summarily reassigned, I have been given no reason why you should wish to relieve me of my functions or remove me from my post, a measure singularly devoid of due process and certainly detrimental to my professional standards and career interests."

The only answer the Applicant seems to have received was a letter of 1 August 2000, from the Director, OHR, UNDP, in which reference is made to the "current budgetary constraints and post reductions" and to the circumstance that unassigned and displaced staff members "may be affected by staff reductions, despite their merits and their willingness to serve". These references completely ignore the fact that the Applicant's post had not been abolished and that he had been arbitrarily displaced from it by the Administration.

III. In fact, the "unassigned status" was rightly compared to an outgoing train from employment in the Organization, by no one less than the Administrator of UNDP, on the occasion of his offer to the Applicant of the Egypt position: "The Administrator stressed that he was offering [the Applicant] a chance to get back to work" and that the Applicant, "given his seniority and his past contributions, was being offered an opportunity 'to get off the train' that was moving along to separate unassigned staff".

IV. Among the information requested of the Respondent by the JAB was the following: "(b) The reasons why the Appellant was removed from his post as Deputy Assistant Administrator/ Deputy Regional Director RBAS in 1996". The answer could not have been more vague:

> "Question (b) is rather more difficult. As the Appellant himself notes, virtually all the principals involved in his removal from the post ... are no longer with UNDP. Those who are still staff members have been either travelling or on sick leave for the last few weeks. At the Appellant's suggestion, Mr. ... was contacted but he said he did not have a clear recollection of what had happened. Ms. ... contacted by e-mail the

> former Director, OHR, Mr. ... now retired. He responded that the exact circumstances of the breakdown between the Appellant and [Assistant Administrator and Regional Director, RBAS] were not clear from his contemporaneous notes, except that [Assistant Administrator and Regional Director, RBAS] wanted the Appellant to move as quickly as possible from his RBAS Office and the Appellant demurred."

In these circumstances, the Tribunal finds the explanation given by the Applicant not at all farfetched: the rationale for his removal from the Deputy Regional Director post was that the newly appointed Regional Director wanted the Applicant "replaced with his own candidate for the Deputy post". But if such was the case, the Administration should immediately have offered him a suitable post and should not have taken advantage of the opportunity to put him on a train of no return with destination to separation from the Organization. If there were no such jobs available, he should have been left in the position he was encumbering with brilliant performance. At any rate, when the Applicant was launched into that unhappy status, the Administration should have made sure that there was no other staff member with less seniority or without permanent contract or with less distinguished service to the United Nations, who should have been put on the train before the Applicant. There is no evidence that the Administration did that, nor did it claim to have done so. Moreover, even when he actually encumbered the post of Deputy Executive Director and Director of Programme in UNFIP he continued to be considered as having "unassigned status". "Unassigned status" apparently dies hard.

V. The conduct of the Administration arbitrarily consigning the Applicant to "unassigned status" must be read in conjunction with the failure of the Administration to make any real effort to obtain a suitable post for the Applicant, as required by the Staff Regulations and Rules. Undoubtedly, had the Administration obtained a suitable job for the Applicant, and if he had accepted the new position, this would have remedied the original vice of effectively declaring him ready for separation, as was done in the year 2000. But no such effort was undertaken by the Administration, as the JAB found. The Applicant applied for eight D-2 posts, and except for the post of Director, Technical Cooperation among Developing Countries Unit (TCDC) - for which he was not selected - he was not even considered for any of them. The Tribunal agrees with the JAB's opinion that at least some of those posts were not dissimilar to the ones

the Applicant had held in the past, and that apparently he was satisfactorily qualified to occupy any of them.

VI. Moreover, external competitors were called to the TCDC post, and, in fact, one of these external competitors was selected for the post. It stands to reason that internal competitors have a priority over external competitors. Even though the "HR policies and procedures in connection with Headquarters reduction" did not exist at that time, the Tribunal may assume that it reflects values and practices prevailing in UNDP up to the moment of being issued. Point 4 of that instrument reads:

> "If no eligible internal candidates are found suitable, vacancies are then opened to externals. In some cases, there are good reasons to anticipate that it will be difficult to find well-qualified internal candidates; in such cases, the post may be advertised internally and externally simultaneously, (OHR is to be consulted in these cases) When a vacancy is advertised at the same time internally and externally, the internal candidates should be given priority among equally classified candidates."

Notwithstanding the rather outstanding antecedents of the Applicant, the selection was undertaken under the impression that the Applicant, as an internal candidate, was not going to be satisfactory.

VII. In view of the above circumstances, the Tribunal is satisfied that a doubt exists with respect to the Administration's *bona fides* in its efforts to place the Applicant in a suitable position. In such cases, the Tribunal's repeated contention that the *onus probandi* falls on the Respondent is amply applicable here. The Tribunal has held in the past that "where there is a doubt that a staff member has been afforded reasonable consideration, it is incumbent on the Administration to prove that such consideration was given". (See Judgement 910, *Soares* (1998), para. IV, citing Judgment No. 447 *Abbas* (1989).) In paragraph IV of *Soares*, the Tribunal held:

> "This rule is interpreted to mean that a good faith effort must be made by the Organization to find alternative posts for permanent staff members whose post are abolished. The Respondent must show that the staff member was considered for available posts and was not found suitable for any of them prior to termination (cf. Judgement No. 85, Carson (1962))."

VIII. The Respondent offers little, if any, evidence that it exercised due diligence in this respect. The Tribunal cannot but agree with the JAB when it found an absence of such due diligence and necessary good faith efforts on the part of the Administration in placing the Applicant in any suitable position after having put him on the fatal train towards termination of employment.

IX. There is an episode that the Respondent invokes as proof of his good faith that, in fact, he offered the Applicant at least one suitable job, namely, a three-month position in Egypt followed by 12 months at Headquarters. The refusal of the Applicant to accept the position was offered by the Respondent as an example of the Applicant's intransigence. The Tribunal holds a completely different view with regard to the real meaning of that offer, due to the circumstances surrounding it and the form in which it was couched. There is a note of the interview between the Administrator and the Applicant in which a record is made of the exchanges between them, in the presence of several witnesses. The offer was preceded by an explanation on the part of the Administrator, as follows:

> "In the effort of the Administrator to place [the Applicant], he was struck by the fact that many had expressed concerns about [the Applicant]. 'Old ghosts have raised their heads'. In particular, the Administrator said that UNDP staff had raised issues on [the Applicant's] willingness to fit in and be a "team player" and that he was too focused on status and rank. The Administrator stressed that as he had no working relationship with [the Applicant], he had no basis to evaluate these concerns. But he wanted to share them with the staff member because [the Applicant] needed to be conscious of how he is perceived by his colleagues. Such concerns would affect his ability to be effective. The Administrator stressed that if these perceptions resonated in any way with the Applicant he should focus on them or there could be a problem down the line."

The offer itself consisted of three months in Egypt and then a year in a non-budgeted post at Headquarters:

> "*While not a budgeted post, the idea would be for [the Applicant] to work first as the OIC and then take on the duties for a year after which time all could take stock. The year would allow [the Applicant] the opportunity to remind the community of colleagues why he had been viewed as a rising star. Assuming that all went well, the Administrator that the UNDP [sic] would make every effort to place [the Applicant] appropriately.*" (Emphasis added.)

This interview entirely clarifies what was the position of the Applicant regarding a group of influential staff members in UNDP and, what is worse, regarding the Administrator himself. Without taking the trouble of verifying the accuracy of the allegations by the virtual jury in the shadows, consisting of those highly placed staff members, or giving the Applicant the opportunity of refuting the features attributed to his character, the Administrator *acted upon* those notions and sent the Applicant, a D-2 staff member, who had acted in the past on the level of Assistant Secretary-General, on a probation job.

Probation it was, and nothing less. This is clearly shown by the words in italics above quoted: the Applicant was given a year to prove that the allegations that had reached the Administrator's ears were unfounded. Then, if everything went well, *i.e.*, presumably if the Applicant could show sufficient humility of character and team spirit, then and only then would the Administration "make every effort to place [the Applicant] appropriately". This can only mean that up to that point, not every effort had been made by the Administration to place the Applicant appropriately. Contrary to the Respondent's contention that the Applicant's decision not to accept the offer was evidence of the Applicant's effort to impose conditions, the Tribunal is satisfied that, in fact, the Applicant simply refused the job because of its probationary nature.

The Tribunal is satisfied that acting upon an unverified notion about the character of a staff member without giving him the opportunity to refute that notion is prejudicial. Acting on prejudice is discrimination.

X. The recorded interview is also illuminating regarding the "unassigned status" of the Applicant. "Old ghosts have raised their heads" said the Administrator, meaning undoubtedly that the prejudice regarding the Applicant was not new, but had its roots in the past. It requires no stretch of the imagination to conclude that those ghosts of the past had also influenced the placement of the Applicant on "unassigned status" when he was arbitrarily displaced from the post he was occupying. This also resulted in the lack of consideration that he suffered when he applied to posts prior to the time he was notified of his impending termination in the year 2000.

XI. Lastly, the Tribunal would like to examine the issue of the Applicant's refusal to accept field assignments - or for not having "recent field experience"- as a cause of his not being offered suitable posts, an allegation of the Respondent that, after the evidence commented upon in some of the previous paragraphs, has a somewhat dubious ring.

The Tribunal would like to emphasize that the principle according to which staff members must accept the positions that management assigns to them, wherever those positions are situated in the world, is central to the functioning mechanisms of the United Nations. Having said that, the Tribunal must dwell upon the manner in which the Respondent, being the decisive instance in the assignment of posts, has applied that rule in the practice of the Organization.

The Applicant has shown, and was not contradicted, that on many occasions field experience or rotation - recent or not - were not considered essential requirements to appoint candidates in several posts. Obviously, field experience and rotation have been applied almost on a case-by-case basis. The Tribunal does not want to pronounce on the wisdom of such a policy, but it is not satisfied that this was how it was applied by the Respondent generally, only that it was applied, selectively, in the case of the Applicant. This was particularly so in the circumstances of the Applicant, who had in his favour the conditions of his children and their need of special schooling, as well as his closeness to retirement age and the distinguished services he had rendered to the Organization. On the other hand, the offer made to the Applicant, on 31 January 2001, by the Administrator was of a temporary post of one year in Headquarters, after a token stay in Egypt. Thus, the Tribunal is satisfied that that field experience or rotation was not a real prerequisite in the placement of the Applicant.

XII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to reinstate the Applicant in a post suitable to his qualities and ability, as well as his seniority, with all salary and benefits;

2. Fixes the compensation to be paid to the Applicant at two years' net base salary at the rate in effect at the time of his separation from service, if the Secretary-General decides within 30 days of

the notification of the Judgement, in the interest of the United Nations, not to reinstate the Applicant; and,

3. Rejects all other pleas.

(Signatures)

Julio **Barboza**
President

Kevin **Haugh**
Vice-President

Jacqueline R. **Scott**
Member

Geneva, 25 July 2003

Maritza **Struyvenberg**
Executive Secretary

BANERJEE

United Nations AT/DEC/1129

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1129

Case No. 1226: BURBIDGE Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Mr. Spyridon Flogaitis; Ms. Brigitte Stern;

Whereas at the request of Robert Burbidge, staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 30 June 2001 and subsequently to 31 October 2001 the time limit for the filing of an application with the Tribunal;

Whereas on 31 October 2001 the Applicant filed an application containing pleas which read, in part, as follows:

"II. PLEAS

...

8. On the merits, the Applicant respectfully requests the Tribunal *to find*:

"(a) that the Applicant meets the criteria for the granting of the long-service step set forth in ST/IC/87/46 [of 27 August 1987] ...

...

9. ... *to order* as remedy:

(a) that the Applicant be granted a long-service step retroactive to 1 January 1997;

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or, failing that:

(b) that the Applicant be granted compensation as follows:

- $11,477 (amount he would earn from 1997 to date of retirement had he been granted the long-service step);
- $6,250 (amount of difference the long-service step would make in his pension ...)."

Whereas, at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 5 March 2002 and twice thereafter until 31 August 2002;

Whereas the Respondent filed his Answer on 31 July 2002;

Whereas the Applicant submitted his Written Observations on 10 February 2003;

Whereas the facts in the case are as follows:

After working for a number of years - from October 1971 to December 1983 - as an English language teacher at Headquarters under a series of special service agreements, the Applicant became a staff member effective 1 January 1984 on a fixed-term appointment for two years as an English language teacher at the T/IV level with the Office of Personnel Services (now the Office of Human Resources Management (OHRM)). On 1 March 1990 he received a permanent appointment. From 1 November 1991 to 11 December 1992 the Applicant received a special post allowance at the P-2 level. At the time of the events that gave rise to the present application, the Applicant was a language teacher at the LT1 level with OHRM.

On 21 March 1997, the Applicant wrote to the Senior Administrative Officer of the Department of Management on behalf of himself and six other language teachers, requesting that they should be placed at the long-service step of the salary scale. He indicated that the staff members concerned had all been serving the Organization for more than 20 years and therefore met the criteria for a long-service step increase. The Applicant reiterated this request in a memorandum dated 16 June 1997 addressed to Ms. Legaspi, Administrative Officer of the Department of Management.

On 23 June 1997 Ms. Legaspi informed OHRM that a review of the files of the seven staff members confirmed that they had completed five years of service at the top step, but, taking into account their official entry-on-duty (EOD) date of 1

January 1984, the long-service step would not be due until 1 January 2004. However, given the special circumstances involved in their appointments, she asked OHRM to consider the language teachers' request to obtain their long-service step increase effective 1 January 1997. On 28 January 1997, OHRM replied that it was not in a position to accede to the Applicant's request, because, although the special services agreements had given the language teachers some entitlements, it had nevertheless prevented them from being considered as regular staff members. The Applicant was so informed on 10 September 1997.

On 10 November 1997 the Applicant asked OHRM to reconsider its position. He attached a memorandum dated 13 April 1989 in which the Deputy Chief of the Compensation and Classification Service, OHRM, stated, among other things:

> "Implicit in the question of the delay in carrying out the salary survey for the language teachers is the issue of de facto recognition of five teachers' service with the Organization prior to their acquiring the status of staff members ... We would observe that the issue of seniority of these five teachers had already been taken in consideration in 1984 when the language teachers were placed on the provisional scale ... We would point out that the Organization has recognized long service for all locally-recruited staff members, including the language teachers, by the inclusion of a long-service step in the salary scale (step XI)."

On 5 December 1997, OHRM submitted the question to the Chief of the Rules and Regulations Unit for a ruling. On 29 December 1997, the Chief of the Unit replied that "the 20-year period of service for entitlement to the long-service step should be calculated on the basis of the EOD date" in accordance with General Assembly resolution 38/234 of 20 December 1983 and ST/AI/316 of 6 March 1984. On the same date, OHRM informed Ms. Legaspi that the Rules and Regulations Unit had confirmed that the service of the language teachers prior to 1 January 1984 would not be taken into account in determining their years of service for purposes of the long-service step. The Applicant was so informed on 30 December 1997.

On 20 April 1998 the Applicant requested administrative review of the decision not to grant him the long-service step.

On 16 September 1998 he filed an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 8 November 2000. Its conclusions and recommendations read, in part, as follows:

"**Conclusions and recommendation**

24. In the light of the foregoing, the Panel *unanimously agreed* that, though not considered as a staff member prior to 1984, the Appellant nevertheless provided the recognized service to the Organization. It also *unanimously agreed* that in view of the history of the language teachers leading to the granting of the status of a staff member to the Appellant and other language teachers and the purpose of a long-service step the Administration as a good employer should take in consideration the years of service rendered by the Appellant before 1984 and view them exceptionally as falling within the meaning of 'service within the United Nations common system'.

25. The Panel thus *unanimously recommends* that the Appellant be granted a long-service step retroactive to 1997, if it can be established that he had indeed completed five years at the top regular step of his current grade in 1997.

26. The Panel wishes to emphasize that it makes the above recommendation out of its sense of equity and fairness and its appreciation of the years of devoted service provided by the Appellant. The recommendation is made on the merits of this individual case and should not be viewed as creating a precedent."

On 16 April 2001, the Under-Secretary-General for Management transmitted a copy of the report of the JAB to the Applicant and advised him as follows:

"While appreciating the sentiments behind the position taken by the Board, the Secretary-General is not in agreement with that position. The long-service step is an entitlement that is based on the duration of the staff member's service *as a staff member* and, in your case, it began accruing from the date of your entry on duty as a staff member, that is, on 1 January 1984. Your service prior to that date could only be taken into account, as indeed it was, for the purpose of determining the appropriate steps on a salary scale, as is routinely done at the time of recruitment. For this reason, the Secretary-General cannot accept the recommendation of the Board ..."

On 31 October 2001, the Applicant filed the above-mentioned Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The JAB found that the Applicant met the requirements as per the intention of the staff rule and ruled unanimously in his favour.

2. Prior to 1984, the Applicant was a de facto staff member. Moreover, the General Assembly recognized the Applicant's prior service at the time his status was converted. General Assembly resolution 38/234 and administrative instruction ST/AI/316 regularized his status by changing it to that of staff member, which amounted to the recognition and legitimization of a function that had already existed for a number of years.

3. The Administration created a clear expectation that the Applicant would receive a long-service step.

Whereas the Respondent's principal contentions are:

1. The Applicant was not a staff member prior to 1 January 1984 and the grant of staff member status in 1984 had no retroactive effect.

2. The Applicant's contractual status prior to 1984 was not "service within the United Nations common system". The Applicant is not entitled to the long-service step awarded under ST/IC/87/46 to staff members who have served within the Organization for more than 20 years, the last five of which were at the top step in level.

3. The award of a long-service step as requested by the Applicant would constitute an ex gratia payment since no legal liability has attached. Moreover, there is no "moral obligation" for the Organization to make such an award. Accordingly, such an award is not warranted.

The Tribunal, having deliberated from 3 to 25 July 2003, now pronounces the following judgement:

I. The Applicant began to work for the United Nations as an English language teacher in 1971. From 1971 to 1983 he was employed under special service agreements before becoming a staff member of the United Nations, first on a fixed-term contract for two years and subsequently, effective 1 March 1990, on a permanent contract. Effective 1977, his status had become akin to that of a staff member. In 1997 the Applicant asked the Administration to place him at the long-service step introduced by information circular ST/IC/87/46 of 27 August 1987, since he met the established criteria:

> "The following criteria ... will apply for the granting of the long-service step:
>
> "(a) The staff member should have had at least 20 years of service within the United Nations common system and 5 years of service at the top regular step of his/her current grade;
>
> "(b) The staff member's service has been entirely satisfactory."

The Administration refused to place him at the long-service step, arguing that he did not have 20 years of service as a staff member.

II. The first point that the Tribunal should make clear is that there is no dispute that when a staff member meets the criteria set forth in the circular, he/she is entitled to be placed at the long-service step. That conclusion derives from the wording of the circular itself, which makes the granting of the long-service step subject only to the stated criteria and allows the Administration no room for discretion, as is generally the case for promotions. In other words, it is sufficient for the criteria to be met in order for the staff member to be entitled to be placed at the long-service step.

III. This was the reasoning the Tribunal followed in another case concerning the granting of the long-service step, in which it limited itself to verifying that the three criteria set out in the relevant circular, IC/Geneva/3383, were met, and held that, since they were, the Applicant was entitled to be placed at the long-service step retroactively:

> "The Tribunal must ... consider the nature of the right claimed and the conditions attached to it. The circular [concerning the long-service step] ... stipulates that the long-service step is subject to the following criteria:
>
> "(a) Twenty years of service within the common system;
>
> "(b) Five years of service at the top of the grade; and
>
> "(c) Entirely satisfactory service."
>
> "The Applicant has satisfied the condition set out in (a), of twenty years of service. ... the Tribunal finds that the Applicant has met the condition set forth in (c). ... the condition set out in (b) has also been met. The Applicant is **therefore** entitled to the long-service step. Accordingly, the Tribunal considers that the Applicant's claim for a long-service step should be granted, with effect from 3 May 1990" (Judgement No. 724, *Fussimamya-Reyna*, 21 November 1995, paras. V and VI, emphasis added by the Tribunal).

In other words, it is necessary and sufficient for the three criteria to be met to give rise to an entitlement to be placed at the long-service step. In the above-mentioned case, the Tribunal held that the Applicant had retroactive entitlement, from the very day after she had requested it.

IV. The Tribunal will proceed in the same manner in the present case. In order to determine whether the Applicant's entitlement to be placed at the long-service step has been violated by the Administration, it will consider whether the criteria necessary for the granting of the long-service step were or were not met.

V. As it happens, the problem centres on the criterion concerning 20 years of service. That the Applicant has always been given good evaluations has not been

disputed by the Administration and should be considered established. The second criterion is therefore met. Paragraph 2 (a) of information circular ST/IC/87/46 of 27 August 1987 actually sets out two conditions: 20 years of service and five years of service at the top step of the grade. There is no doubt that the second of these two conditions has been met. It is established beyond dispute, and in any case is not disputed by the Respondent, that by 1 January 1997 the Applicant had been at the top step of his grade for five years. What is yet to be determined is whether the remaining condition that would entitle the Applicant to be placed at the long-service step has been fulfilled. It is on this point that the contentions of the parties differ. The Applicant considers that in 1997 he had been in the service of the Organization for 26 years, 20 of those as a de facto staff member. The Respondent considers that "the Applicant was not a staff member prior to 1 January 1984" and that he is not entitled to the long-service step because "the long-service step is an entitlement that is based on the duration of the staff member's service **as a staff member**" (letter of 16 April 2001 from the Under-Secretary-General for Management addressed to the Applicant; emphasis by the Administration).

VI. The Tribunal will now interpret the relevant documents, in particular the circular that sets the criterion of 20 years of service within the United Nations system, but also circular ST/AI/316 of 6 March 1984 granting the status of staff members to full-time language teachers.

VII. The intent and purpose of circular ST/IC/87/46 of 27 August 1987 creating the long-service step was to recompense deserving staff members who had served the Organization for more than 20 years, five of which were at the highest step of their grade. The additional step was made retroactive to 1 January 1985.

VIII. The question the Tribunal must answer, therefore, is what is meant by 20 years of service with the United Nations and, consequently, from what date the Applicant's work should be considered service with the United Nations. The answer depends on what is meant by "service within the United Nations common system". The circular does not define what is meant by "service", as even the Respondent admits, when he writes that circular ST/IC/87/46 "contains no definition of 'service within the United Nations common system'".

IX. In order to make the matter perfectly clear, it should be specified, as the Applicant does, that "the Applicant is not asking the Tribunal to recognize, for purposes of this appeal, the period of service from October 1971 to 1976". He is

only asking for recognition of his services from 1977 on, when he had a status very close to that of a staff member. According to the Applicant, "from 1977 to 1983 his service equates the exact manner, level, equity and competence he offers today. The only difference between 1977 to 1983 and 1984 to date was in the manner that service was recognized and compensated". The Respondent, however, categorically refuses to take into account any services other than those performed as a staff member, in other words, services from 1984 onwards.

X. The Tribunal will begin by examining the text of circular ST/IC/87/46, which created a long-service step "for staff in the General Service and related categories". In the Tribunal's opinion, it is clear from the terms of the circular that the long-service step should also be applicable to those in a situation comparable to that of an employee in the General Service category.

XI. Second, the Tribunal considers that the Applicant was in just such a situation akin to that of employees in the General Service category. As it happens, the Applicant, like the other language teachers, was granted progressively, beginning in 1973 but especially from 1977 on, a range of entitlements which were staff member entitlements. This point was recognized by the Joint Appeals Board in the following terms:

> "The Appellant's case was unique, in the sense that, while working as a non-staff member before 1984, the Appellant acquired **a range of benefits and entitlements normally reserved for a staff member** ..." (emphasis added by the Tribunal).

More specifically, the Applicant enjoyed the medical benefits of a staff member, as well as paid vacation leave like that of a staff member. Moreover, he was eligible for compensation in the event of service-incurred death. Furthermore, the Applicant states, and the point is confirmed by examination of his file, that "similar to staff members he was entitled to one month's written notice and termination indemnity and according to Annex I of the Agreement, he was entitled to two days' sick leave per month". These various elements, which put language professors on close to the same footing as United Nations staff members, were also commented upon by the JAB:

> "... the Appellant and other language teachers became eligible for participation in the United Nations medical insurance schemes and compensation for **service**-incurred death, injury or illness, sick leaves and payment for vacations and official holidays, entitlements usually reserved only for staff members" (emphasis added by the JAB).

The language teachers' special situation was spelled out from 1977 on in a "Language Teacher Employment Agreement", concluded annually, which, in the Applicant's view, gave him "benefits similar to those extended to regular staff members".

XII. The Tribunal must examine the Administration's argument that the decisions in 1984 on integrating language teachers into the category of staff members of the Organization cannot be considered as retroactive texts conferring the status of staff members on language teachers from the date of their recruitment to 1 January 1984: "... the grant of staff member status in 1984 had no retroactive effect". The Tribunal agrees with that analysis. But it is one thing to make a text retroactive and another to take certain past facts into consideration in implementing a text prospectively. It so happens that, in implementing the circular granting the status of United Nations staff members to language teachers, **the Organization took into consideration their service, as service**, in order to confer certain rights on them. The Applicant is not asking any more than that. He is not asking to be considered to have been a staff member since his recruitment and in consequence to be entitled, retroactively, to all the rights of staff members. He is simply asking that, for purposes of his placement on the salary scale in 1997, his years of service should be taken into account, as they were in 1984.

XIII. Moreover, the Tribunal should point out that the Administration itself thought of the work performed by the Applicant and by the other language teachers before they became staff members as "service" within the Organization. That was the position of the Administration before they became staff members, as well as when and even after they became staff members.

XIV. Before the language teachers' status was converted to that of United Nations staff members, it was generally acknowledged that they were performing a service within the Organization, and it was precisely because those services had not been recognized as they should have been that the process of converting their status was undertaken.

XV. The Tribunal has examined a Fifth Committee document concerning the status of language teachers in which the Secretary-General's proposal to grant them the status of staff members was discussed (A/C.5/37/63, dated 1 December 1982). The objectives of the conversion of status were described as follows:

> "The objectives of the proposal were twofold. The first was to improve the efficiency of the language training programme ... The second objective was to provide language teachers who at that time had served the Organization an average of nearly nine years under uncertain conditions of service with a regularized status ..."

The notion that there was something irregular about the situation as it stood can be found in a number of places in the document, for example, where it says: "The method proposed for regularizing the contractual status of language teachers consisted of ..."

XVI. When the language teachers became staff members, it was also considered that they had completed a number of years of service at the United Nations prior to their integration as staff members. That aspect of the matter did not escape the notice of the JAB:

> "The issue as to whether the work of the language teachers before 1 January 1984 should be considered as service came up in 1984 when the Administration was determining where to place them on a provisional salary scale. It was then decided that the years of work by the language teachers including the Appellant prior to 1984 should be taken into consideration. 'A scheme was therefore devised whereby those teachers having the most **service with the United Nations** (i.e. 10 years or more) were placed at step IV of the provisional scale. Those with 7-9 years of **service** were placed at step III, and so on'" (emphasis added by the JAB).

When making the Applicant a staff member, the Organization did in fact take into consideration his years of service, converting his position of de facto staff member to the status of de jure staff member. The JAB took note of that consideration:

> "... his years of work as a non-staff member before 1984 [were] subsequently recognized as 'service' for the purpose of computation of his seniority step in the salary scale.
>
> ... The Appellant was placed at step IV of the provisional scale."

The Tribunal thus finds that the Administration did take into consideration the years of service prior to 1984 in determining the seniority step of each teacher, even though, because of the evolving situation around 1977, the years were not strictly calculated.

XVII. Furthermore, the Tribunal notes certain indications that the Administration continued to consider the work performed prior to 1984 as service within the United Nations.

XVIII. The parties differ in their interpretation of a statement contained in the memorandum of 13 April 1989 from the Deputy Chief of the Compensation and Classification Service, who was responding to the concerns of the language teachers about their salary scale. They had been placed on a provisional salary scale in 1984 when they became staff members, and the new revised scale was not put into effect until 1 December 1989. Some of the teachers complained about the delay in drawing up the revised scale and thought that they should be promoted, since they had remained at step V for three years. The Administration rejected the request, explaining that their years of service had already been taken into consideration and, in the Applicant's interpretation, would also be taken into consideration in calculating the seniority entitling them to the long-service step, which did not exist in the provisional scale but would be incorporated in the revised scale. It will be useful to cite the passage on which interpretation differs:

> "We would observe that the issue of seniority of these five teachers had already been taken into consideration in 1984 when the language teachers were placed on the provisional scale. It should be noted that all provisional language teacher scales consisted of five steps. A scheme was therefore devised whereby those teachers having the most service with the United Nations (i.e. 10 years or more) were placed at step IV of the provisional scale. Those with between 7-9 years of service were placed at step III, and so on. We would point out that the Organization has recognized long service for all locally recruited staff members, including the language teachers, by the inclusion of a long-service step in the salary scale (step XI)."

The Applicant considers that this statement by the Administration "created a clear expectation that the Applicant would receive a long-service step", and goes on to say:

> "[After recognizing] the Applicant's long-service step **in the context of the prior years or service** and seniority, it would seem to be disingenuous of the Administration to then turn around and find that those same prior years of service and seniority would not count towards the long-service step entitlement" (emphasis added by the Tribunal).

He also states that:

> "Any other interpretation of his words would be tautological. If he only meant that the teachers would be eligible for a long-service step once they became staff members (and fulfilled the requisite conditions) his statement would be the equivalent to stating that locally recruited staff members will be entitled to a long-service step in the same way as other locally recruited staff members."

The Respondent interprets the statement quite differently to mean that, like others, teachers, being staff members, counting from the time that they become staff members, will have the prospect of benefiting from the long-service step.

XIX. In the Tribunal's view, the Administration's interpretation is untenable, because it is contrary to the sense that must have been given to this statement in 1989 and would lead to an absurd and inequitable outcome. If the Administration, in refusing the language teachers a promotion, told them that in recompense they would be entitled to a long-service step, that would have amounted to telling them that when they completed 30 years of service with the United Nations (in the case of those placed at step IV because they had 10 or more years of service prior to 1984) or 27 to 29 years of service with the United Nations (in the case of those placed at step III because they had from seven to nine years of service with the United Nations prior to 1984) they would be eligible for the long-service step. The absurdity of such a statement argues against the Respondent's interpretation.

Moreover, the Administration's interpretation would lead to the absurd, inequitable result, contrary to the Administration's aim in changing the status of language teachers, that when the Applicant retired in 2001 "[would] have been working full-time in the common system for more than 29 years and [would] have been blocked at the top of his grade for nine years without ever benefiting from the long-service step".

XX. Lastly, the Tribunal notes that, when the Applicant submitted his request for placement at the long-service step, the Administrative Officer of the Department of Management appeared to consider the request admissible, in view of the terms of her letter of 23 June 1997 addressed to the Officer-in-Charge, Cluster IV, Operational Services Division, OHRM:

> "However, **if we were** to take into account their official EOD date of 1 January 1985, the long-service step **would not be** due until 1 January 2004.
>
> ...
>
> We would appreciate OHRM's consideration of the Language Teachers' request to obtain their long-service [step] effective 1 January 1997, given the **special circumstances** involving their appointments" (emphasis added by the Tribunal).

The use of the conditional to state the position now defended by the Respondent and the mention of special circumstances show that the writer of the

letter was not contemplating a restrictive reading of the circular granting the long-service step.

XXI. The Administration's position has now changed, and suddenly it is unwilling to consider any but the years of service as a staff member, wiping out with the stroke of a pen the years of service prior to 1984. To justify its position, the Respondent elaborates a number of arguments that the Tribunal will now examine. Two lines of argument in particular are advanced. The first is that "service" should not be confused with "services". The second is that, even if the Applicant's work could be considered service with the United Nations, it is too limited and restricted to be taken into consideration in granting the long-service step. In that connection, the Respondent invokes the jurisprudence of the Tribunal, which it claims supports its position.

XXII. The Tribunal will begin by examining the first line of argument, in which the Administration seeks to draw a distinction between "service" within the United Nations system and "services" provided to the Organization, in the following terms:

> "The Respondent asserts that providing services to the United Nations from outside of the United Nations common system is very different from being in 'service within the United Nations common system'. Many services are provided to the Organization, whether by its full-time staff members, by independent contractors or consultants, or by outside vendors and service people."

The Tribunal agrees with the distinctions proposed, but considers that no consequences can be drawn from them in relation to the specific situation of the language teachers. While the distinction is certainly valid, it does not lead to the conclusion, in the Tribunal's view, that language teachers are to be considered providers of occasional services.

XXIII. The Tribunal now comes to the Respondent's remarks in which he describes the Applicant as simply an occasional employee. The Respondent's statement that prior to 1984 "the Applicant provided occasional service for limited periods on an hourly basis" is in contradiction to the Administration's analysis in 1979, as evidenced by a memorandum dated 28 August 1979 concerning the contract status of the language teachers, in which their situation is described as follows:

> "... By 1972, a disparity was clearly apparent between their actual status as 'part-time' teachers, most of whom carried nearly full-time loads, and their de jure status as hourly employees receiving no benefits beyond their hourly pay. Subsequently, ... a series of improvements were introduced ...

As of August 1979, ...

The de facto situation is that the 24 teachers holding Language Teacher Employment Agreements teach as many hours per week and as many months per year as full-time teachers in local schools and universities."

This point is also brought out in the nineteenth report on the proposed programme budget for the biennium 1982-1983 submitted by the Advisory Committee on Administrative and Budgetary Questions (ACABQ) to the General Assembly (A/36/7/Add.18), in which the Secretary-General's position is described:

"... the Secretary-General ... states that the granting of staff-member status to the full-time teachers would improve the over-all efficiency of the language training programme. In this connexion, the Advisory Committee notes that the Secretary-General regards as 'full-time' the teachers who provide an average of 14.5 to 15 hours of instruction a week."

The same analysis was reiterated in the twenty-fifth report on the programme budget for the biennium 1982-1983 submitted to the General Assembly by the ACABQ (A/37/7/Add.24), in which the issue of granting staff-member status to language teachers continued to be discussed, in the following terms:

"The Committee recognizes that a legitimate basic problem exists - that of providing job security and other employment benefits for full-time teachers, several of whom **have devoted many years of service** to the United Nations" (emphasis added by the Tribunal).

It is also pertinent to look at what ACABQ said in its document A/36/7/Add.18, to the effect that it "agree[d] that individuals who **serve**[d] the United Nations on a full-time basis over a period of years should not be regarded as casual employees" (emphasis added by the Tribunal).

In the view of the Tribunal, the assertions that the Applicant merely worked for the Organization on an occasional basis are contradicted by the Applicant's file.

In any event, the Applicant cannot be considered an occasional employee from 1977 on. The Tribunal notes that up to 1976 his contracts bore the title of "Teacher Agreement for Occasional Employment" but from the start of the academic year 1977/78 they were entitled "Language Teacher Employment Agreement". The terms used in the contracts also changed. Prior to 1977, they specify that the Applicant "shall serve as an occasional employee as English language teacher"; starting in 1977 they state that the Applicant "shall serve as English language teacher". Moreover, the Tribunal notes that the Respondent's assertions are also in

contradiction with the position he took in 1984 and would make it hard to understand why the Administration counted limited and occasional services as years of service, to the benefit of the language teachers.

XXIV. Lastly, the Tribunal turns its attention to the precedent invoked by the Respondent in support of his refusal to count years of service prior to 1984 towards the long-service step. The Respondent cites the *Fayad* case (Judgement No. 176 (1973)), in which the Tribunal rejected the argument that a period of employment completed by the Applicant under a contract signed with the United Nations should be validated for participation in the United Nations pension fund, on the grounds that the Applicant was not a full-time staff members of the Organization during the relevant period. However, the Tribunal does not consider the precedent relevant to the present case, because the factual circumstances were completely different. In the *Fayad* case, it was "clear from the provisions of the judiciary contract ... that the Applicant would perform his functions on behalf of the Republic of the Congo and subject to the latter's authority ...", and that "the clauses of the contract governing annual leave, sick leave and the settlement of disputes differ[ed] from the provisions of the Staff Rules" (ibid., para. VII). The two cases are not comparable either in terms of the daily reality of the functions performed or in the legal aspects.

XXV. In conclusion, it is the Tribunal's view that it would be at least illogical, if not arbitrary, to characterize the Applicant's work as a teacher as service within the Organization over the course of the years and to cease to consider it as service in 1997, just when the Applicant asked to be placed at the long-service step. Not to grant the Applicant the long-service step would be contrary to the purpose and intent of introducing this supplementary step, namely, to give recognition to those who have devoted their lives to the service of the Organization. The decision not to grant the Applicant a long-service step violated the Applicant's rights.

XXVI. For the foregoing reasons, the Tribunal:

1. Decides that the Administration should restore the situation that would have existed if the Administration had granted the Applicant the long-service step effective 1 January 1997 by restoring to him the salary he should have received at that step from that date to his retirement and by calculating his pension on the basis of the salary at the long-service step.

2. Rejects all other pleas.

(*Signatures*)

Mayer GABAY
Vice-President, Presiding

Spyridon FLOGAITIS
Member

Brigitte STERN
Member

Geneva, 25 July 2003

Maritza STRUYVENBERG
Executive Secretary

United Nations AT/DEC/1130

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1130

Case No. 1229: HANNIBAL Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Spyridon Flogaitis; Ms. Brigitte Stern;

Whereas at the request of Jens Ulrich Hannibal, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 30 November 2001 the time limit for the filing of an application with the Tribunal;

Whereas, on 2 November 2001, the Applicant filed an Application, requesting the Tribunal, inter alia:

> "2. ... *to find*:
>
> (a) [that] the Applicant was issued a valid three-year contract extension from 29 January 1999 to 28 January 2002;
>
> (b) [that the request for administrative review] to the Secretary-General and the [appeal to the] Joint Appeals Board [(JAB)]... [were] timely.

3. ... [and] *to order*:

(a) the Secretary-General to pay the Applicant all salary and other emoluments due for the period 29 January 2000 to 28 January 2002;

(b) in the alternative, to order the [JAB] to consider the appeal ... on the merits."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 March 2002;

Whereas the Respondent filed his Answer on 19 March 2002;

Whereas the facts in the case are as follows:

The Applicant joined the United Nations Office for Drug Control and Crime Prevention (UNDCP) Country Office in Myanmar, on a two-year Project Personnel appointment as Director Designate, at the L-5 level, on 29 January 1996. Due to problems in obtaining formal clearance from the Government of Myanmar, the Applicant was temporarily assigned to UNDCP headquarters in Vienna. Effective 4 August 1997, the Applicant was reassigned as Senior Programme Coordinator at the UNDCP Liaison Office, Hanoi, Viet Nam. The Applicant's appointment was subsequently extended for one year, with a recommendation that "if the project post in Viet Nam is regularized then he should be offered a 3-year contract, if not it should be a one-year extension".

In early 1998, the UNDCP Liaison Office in Hanoi was upgraded to a country office and, effective 1 April, the Applicant's appointment was converted to a fixed-term appointment under the 100 series, with the functional title of UNDCP Representative in Viet Nam, at the P-5 level. This appointment was to expire on 28 January 1999. On 18 March 1998, the Chief, Operations Branch, UNDCP, Vienna, recommended a one-year extension of the Applicant's appointment. On 3 April 1998, Human Resources Management Section (HRMS) instead prepared and sent to the Applicant a three-year letter of appointment, which the Applicant apparently signed and returned to HRMS. On the same day, HRMS issued a personnel action form, extending the Applicant's appointment through 28 January 2002.

In early May 1998, HRMS informed the Applicant by telephone that a mistake had been made, and that the letter of appointment should have been for one year only, i.e., until 28 January 2000. A replacement letter of appointment for one year

was prepared by HRMS and sent to the Applicant on 6 May 1998, and, on the same day a personnel action form to this effect was issued. The Applicant signed and returned the one-year letter of appointment on 29 January 1999.

On 16 June 1999, the Chief, Operations Branch, UNDCP, recommended that the Applicant's appointment not be extended beyond its expiration date of 28 January 2000.

On 8 October 1999, the Applicant was advised that no further extension of his appointment was foreseen, and on 4 November he received his separation instructions. The Applicant separated from service on 28 January 2000.

On 6 June 2000, the Applicant requested the Secretary-General to review the decision to replace the three-year fixed-term letter of appointment with a one-year fixed-term appointment, or, alternatively, the decision not to renew his contract beyond 28 January 2000.

On 27 October 2000, the Applicant lodged an appeal with the JAB. The JAB adopted its report on 16 may 2001. Its findings read, in part, as follows:

> **"Findings on Receivability**
>
> ...
>
> 11. ... the administrative decision to withdraw and deny validity to the three-year letter of appointment had been notified in writing to the Appellant in May 1998 and ... the consequences of that decision had been fully drawn and become manifest in October and November 1999. The Panel considers that a request of administrative review should have intervened within two months of the various above-mentioned junctures, and that the Appellant's request filed on 6 June 2000 is therefore not receivable.
>
> *Non-Renewal of Contract*
>
> 12. The Panel notes ... that the Appellant received notice on 8 October 1999 that UNDCP did not foresee any further extension of his appointment beyond 28 January 2000. He received instructions for his separation on 4 November 1999 ... The filing of a request for administrative review of the decision not to renew the Appellant's contract is therefore also beyond the time-limits set by staff rule 111.2(a).
>
> 13. The Panel takes note of the Appellant's allegations that verbal promises had kept him under the impression that he would obtain other employment opportunities with UNDCP, hence the delay in filing the request for administrative review ...

> 14. The Panel notes, however, that the Appellant's allegations relate to verbal statements and that the process of administrative review and appeal revolves around the decisions notified to staff members in writing (staff rule 111.2(a)(i).
> ...
> 15. While the Panel feels strongly that, in general, appellants should have their case heard on the merits whenever possible and is disturbed by the unprofessional manner in which the Appellant's letters of appointment were processed by the Respondent, the Panel has little choice but to declare the appeal not receivable. ..."

On 6 July 2001, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General accepted the JAB's finding and conclusion and had decided to take no further action on his appeal.

On 2 November 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant had a valid three-year contract until 28 January 2002; the Applicant signed the one-year letter of appointment under duress.

2. The contract, which had been signed by both parties, could not be withdrawn unilaterally.

3. The Application is not time-barred. The Applicant had a valid contract which the Respondent refused to recognize. Each month there is a separate administrative decision, refusing to pay the salary that is due. Each such administrative decision gives rise to the possibility of appeal. Thus, the request for administrative review, filed on 6 June 2000, was within the prescribed time-limits.

Whereas the Respondent's principal contentions are:

1. The Applicant's appeal is time-barred.

2. The lack of exceptional circumstances precludes the waiving of the time limits under staff rule 111.2(a).

3. Even if considered on the merits, the Applicant's position is untenable.

The Tribunal, having deliberated from 25 June to 25 July 2003, now pronounces the following Judgement:

I. The Applicant was serving on a fixed-term appointment as the UNDCP Representative in Viet Nam when, on 3 April 1998, he was informed by HRMS that his appointment would be extended for a further three years, through 28 January 2002. The Applicant signed the letter of appointment and returned it to HRMS. In early May 1998, the Applicant was notified by HRMS that the said letter of appointment was erroneously issued and that an amended letter of appointment, reflecting the extension of his appointment for a period of one year, through 28 January 2000, had been sent to him for signature. The Tribunal notes that this extension was in line with the recommendation made on 19 March 1998 by the Chief, Operations Branch, UNDCP. The replacement letter of appointment was sent to the Applicant on 6 May 1998, and was returned duly signed by the Applicant on 29 January 1999. On 8 October 1999, the Applicant was informed that his contract would not be extended beyond 28 January 2000.

On 6 June 2000, the Applicant wrote to the Secretary-General requesting administrative review of the decision to replace the three-year-term letter of appointment with a letter of appointment for one-year.

II. In its jurisprudence, the Tribunal has consistently reaffirmed the importance of observing the time limits prescribed for the various stages of the administrative review process, as well as for other remedies of administrative character. These time limits are of utmost importance for ensuring the well functioning of any administration. They are therefore of public interest and must be interpreted restrictively. Recently, in Judgement No. 1046, *Diaz de Wessely* (2002), the Tribunal stated:

> "In the Tribunal's view, it is of the utmost importance that time limits should be respected because they have been established to protect the United Nations administration from tardy, unforeseeable requests that would otherwise hang

like the sword of Damocles over the efficient operation of international organizations. Any other approach would endanger the mission of the international organizations, as the Tribunal has pointed out in the past: 'Unless such staff rules [on timeliness] are observed by the Tribunal, the Organization will have been deprived of an imperative protection against stale claims that is of vital importance to its proper functioning' (see Judgement No. 579, *Tarjouman* (1992), para. XVII)".

III. Staff rule 111.2 provides, inter alia:

"(a) A staff member wishing to appeal an administrative decision pursuant to staff regulation 11.1 shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing.

...

(f) An appeal shall not be receivable unless the time limits specified in paragraph (a) above have been met or have been waived, in exceptional circumstances, by the panel constituted for the appeal."

Furthermore, Article 7 of the Tribunal's Statute provides, inter alia:

"An application shall not be receivable unless the person concerned has previously submitted the dispute to the joint appeals body provided for in the staff regulations and the latter has communicated its opinion to the Secretary-General ..."

Accordingly, for the Applicant's appeal to be receivable, his request for administrative review should have been made within two months from the day the alleged erroneous administrative action occurred. The decision withdrawing the three-year letter of appointment dates back to May 1998; the notice of non-renewal of the Applicant's contract was made in October 1999 and in November 1999 the Applicant received his separation instructions. The Applicant's request of June 2000 exceeds the two months' time limit even if counted from the last mentioned date. Moreover, the Applicant did not present any exceptional circumstances warranting a waiver of the time limits.

The Tribunal therefore finds that the Application is time barred and thus not receivable.

IV. In view of the foregoing, the Application is rejected in its entirety.

(Signatures)

Julio **Barboza**
President

Spyridon **Flogaitis**
Member

Brigitte **Stern**
Member

Geneva, 25 July 2003

Maritza **Struyvenberg**
Executive Secretary

/HANNIBAL

United Nations AT/DEC/1131

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1131

Case No. 1223: SAAVEDRA

Against: The Secretary-General of the International Civil Aviation Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, Vice-President, presiding; Mr. Omer Yousif Bireedo; Ms. Brigitte Stern;

Whereas, on 4 October 2001, Rachel Saavedra, a former staff member of the International Civil Aviation Organization (hereinafter referred to as ICAO), filed an Application requesting the Tribunal:

"ANNEX II: PLEAS

...

II. On the merits ... *to find*:

(a) that the Secretary-General of ICAO failed to carry out appropriate management procedures whereby, on 20 March 1997 ... he approved a Post Description that did not truthfully reflect the level of responsibility as was indicated in a previous Post Description signed by the Applicant and her supervisor [the Director, Technical Co-operation Bureau (TCB)] on 21 March 1996 ...

(b) that the Applicant has been discriminated against as of 20 March 1997 until 31 May 1998, the date of her retirement ...

(c) that the Respondent denied the Applicant due process ...

III. ... *to order* the Secretary-General of ICAO:

(a) accept the recommendation of the ICAO [Advisory Joint Appeals Board (AJAB)] favourable to the Applicant ...

...

(c) pay the Applicant compound interest ... on the amounts due and owing ...

IV. [To award] the Applicant exemplary and punitive damages for a total amount of $ 150,000 ... as ... compensation for material and moral prejudice due to the mishandling of her case ...

..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 15 February 2002 and once thereafter until 22 February 2002;

Whereas the Respondent filed his Answer on 18 February 2002;

Whereas the Applicant filed Written Observations on 12 April 2002;

Whereas, on 1 August 2002, the Respondent submitted comments on the Applicant's Written Observations;

Whereas, on 30 May 2003, the Applicant submitted a further statement;

Whereas the facts in the case are as follows:

The Applicant joined ICAO as a Travel Assistant at the G-7 level in the Office of the Secretary General, Financial Services Section, Finance Branch, on 14 September 1981. With effect from 1 July 1985, the Applicant was transferred with her post to the Technical Assistance Bureau (TAB, now TCB), Management Support Office (MGS).

On 28 August 1986, the Applicant sent an inter-office memorandum (IOM) to the Chief, MGS, claiming that since 1 July 1985, she had "been doing the work of two employees: Travel Officer (P-2) and Travel Assistant (G-7)". She requested that her post be re-evaluated and enclosed a list of the duties she performed. On the same date, the Chief, MGS, wrote on the IOM that he "strongly support[ed] this case for regrading in view of the responsibilities of the post for all of the Organization's travel arrangements".

On 17 June 1988, the Applicant sent an IOM to the Chief, Personnel Branch (PER), requesting a special post allowance (SPA) retroactive to 2 October 1985, as well as a "temporary promotion" as of the same date. In a handwritten note on the IOM, the Director, TAB, rejected her request. The Applicant was so advised by the Chief, PER, on 29 June.

On 29 June 1988, the Acting Establishment Officer prepared an evaluation of the post of Travel Assistant, noting that on 30 June 1987, a request had been submitted for upgrading of the post to the G-9 level; that on 4 November 1987, the request had been replaced by one calling for upgrading to the P-2 level, in view of the prior existence of a P-2 post of Travel Officer, which had been abolished; and, that an updated job description had also been prepared.

Effective 15 July 1988, the Secretary General approved the upgrading of the post to the P-2 level, and agreed that the incumbent be appointed at that level.

On 21 March 1996, a large exercise was initiated by the Secretary General to update the post descriptions in TCB and a draft post description for the post encumbered by the Applicant was prepared and signed by her and the Director, TCB. A number of revisions were made to the 26 March 1996 post description, and the Secretary General signed it on 20 March 1997. However, as the Applicant did not agree with the revisions made, she refused to sign this post description. On 21 March, she wrote to the Secretary General, requesting a personal upgrade to the P-3 level.

In an IOM dated 26 March 1997, the Applicant requested the Secretary General to review her case. On 25 April 1997, he confirmed in a handwritten note on the IOM that " the relevant job description is the one I have signed on 20 March 1997". On the same day, the Director, TCB, advised the Applicant that the job description that was "signed additionally by the Secretary General ... is the only valid one".

On 25 April 1997, the Applicant appealed to the AJAB. The AJAB adopted its report on 15 March 2001. Its conclusions and recommendations read, in part, as follows:

> "8. **CONCLUSIONS OF THE BOARD**
>
> 8.1 The Board recognises that, in accordance with Staff Regulation 2.2, the Secretary General ... acted within his authority and in the exercise of his prerogatives to decide to alter the nature of the duties to be allocated to the incumbent, as well as the type and level of the supervisory relationship.
>
> ...
>
> 8.5 The Board notes, however, that it has the right to review issues pertaining to potential errors of substance and procedural irregularities which might have occurred in the process of reclassification of post including when the Secretary General signed the impugned post description. The burden of proof rests upon the Appellant.

...

8.10 Based upon the examination of the facts and the testimonies of witnesses, the Board concludes that, with the implied consent of [the Director, TCB], the Appellant continued to perform her duties and responsibilities with a considerable degree of independence and with virtually no review or verification of her work by the supervisor, in the same manner as reflected in Section 6 of the unapproved Post Description of 21 March 1996. ...

8.11 The Board recognizes that the Appellant was entitled to have an accurate post description, which appropriately reflected the actual requirements of the post concerned, with respect to the duties and responsibilities to be performed by the incumbent, as well as to the type and level of supervision. ...

8.12 The Board finds that the approved Post Description signed by the Secretary General on 20 March 1997 ... does not reflect an accurate description of the work performed.

8.13 ... The Board concludes that the above findings constitute an **error in substance** of the approved Post Description signed by the Secretary General on 20 March 1997.

9. RECOMMENDATIONS

9.1 ... [T]he Board finds that it must reject the relief sought by the Appellant in so far as it asks that the remedy be applied from 21 March 1996, since the post description which was signed on that date was not approved by the Secretary General. Furthermore, during the course of the hearings, the Appellant offered clarification that the appeal was directed against the approved Post Description of 20 March 1997.

9.2 ... [W]hereas the Board has no opinion as to whether an accurate Post Description would have warranted higher grading, it nevertheless recommends that the Appellant be awarded a Special Post Allowance for the period of 20 March 1997 until the date of her retirement as compensation for having been required to work under an inaccurate post description, plus an amount equal to her costs or US $ 2,500, whichever is less."

On 10 July 2001, the Secretary-General informed the Applicant that he had rejected the appeal.

On 4 October 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant claims that the draft post description signed by herself and the Director, TCB, on 21 March 1996 was an accurate post description, and that the one signed by the Secretary-General (but not by her) on 20 March 1997 did not reflect truthfully the level of responsibilities of the post.

2. The Applicant received unfair and discriminatory treatment as she was not given an objective and complete evaluation of her functions in accordance with pertinent rules and procedures regulating the classification process.

3. The Applicant suffered considerable anxiety, mental anguish and strain caused by inexcusable, deliberate, unjustifiable and unconscionable delays by the ICAO Management in dealing with her request for fair and accurate assessment of her post.

Whereas the Respondent's principal contentions are:

1. It is the view of the Respondent that the post description of 20 March 1997 provided an accurate description of the duties and responsibilities of the incumbent of the post.

2. The Respondent requests the Tribunal to reject the Applicant's claim that she be paid SPA from 21 March 1997 to the date of her retirement.

3. The Applicant has not met the burden of proving "discrimination and unfair treatment throughout the job classification ordeal", nor has she produced any evidence of "inexcusable, deliberate, unjustifiable and unconscionable delays" by ICAO management in dealing with her request for "fair and just assessment of her post" Thus, her claim for compensation should be rejected.

4. The Applicant has not adduced any evidence of her expenses, nor that they exceeded "the normal expenses of litigation" before the AJAB, warranting payment of costs.

The Tribunal, having deliberated from 1 to 25 July 2003, now pronounces the following Judgement:

I. The AJAB recommended to award the Applicant a special post allowance for the period of 20 March 1997 until the date of her retirement as compensation for having been required to work under an inaccurate post description, plus an amount equal to her costs or $2,500, whichever is less. In addition, the Applicant claims compensation for exemplary and punitive damages to Respondent on various scores, for an amount of $150,000.

II. The reasoning behind the AJAB's recommendation is follows:

> "The Board recognizes that the Appellant was entitled to have an accurate post description which appropriately reflected the actual requirements of the post concerned with respect to the duties and responsibilities to be performed by the incumbent, as well as to the type and level of supervision".

The AJAB cites Judgments No. 645, *Fussimanya-Reyna* (1994), and No. 396, *Waldegrave* (1987) of the Tribunal in support of the following contention:

> "although it is not the function of the Tribunal to substitute its judgment for that of the Secretary-General in job classification matters, the Tribunal had jurisdiction to determine whether under all the circumstances, the Respondent has acted within its reasonable discretion".

III. The Board goes on to say that:

> "the approved Post Description signed by the Secretary General on 20 March 1997 contains but a theoretical idea with respect to the supervisory relationship, which ICAO was not in a position to implement within a reasonable period of time and therefore does not reflect an accurate description of the work performed.
>
> The Board advises that the impugned Post Description should have provided an accurate description of the duties and responsibilities required from the incumbent, and the determined level of supervision should have been implemented within a reasonable amount of time. The Board concludes that the above findings constitute an **error in substance** of the approved Post Description signed by the Secretary General on 20 March 1997."

IV. The Tribunal acknowledges that neither the AJAB nor the Tribunal itself can substitute its judgment for that of the Administration. The Tribunal recognizes the Administration's discretion regarding post classification and also job descriptions. The Tribunal's only competence in this respect is to assure that there has been, in the process of classifying, no violation of due process of law, arbitrariness, discrimination or other improper motivation. (See Judgement No. 541, *Ibarria* (1991).

V. The Tribunal, however, does not believe that there has been, on the part of the Administration, an error in substance nor does it share some of the AJAB's conclusions on the matter of supervision in the different job descriptions mentioned in the case.

VI. The Applicant objects to the job description signed by the Secretary General on 20 March 1997. The job description was the end result of a process which began about one year earlier, in 1996, when a job description was apparently prepared by the Applicant (hereinafter referred to as "PD1") which was, needless to say, entirely to her satisfaction. But before submission to the Secretary General for approval, PD1 was submitted for examination to other organs and staff members who usually participate in the task of drafting post description and resulted in the post description of 20 March 1997 (hereinafter referred to as "PD2").

VII. According to the testimony before the AJAB by the Acting Director, TCB, who was, in his own words, "responsible for reviewing the job description of the Appellant as part of a general exercise to review and update all post descriptions in TCB", it was not unusual, in the process of reviewing job descriptions, to change the wording several times before the exercise was finalized. This opinion coincided with the testimony of the Classification Officer, another witness in the AJAB procedure, according to whom the changes in PD1 resulted from an interview with the Chief, Establishment Section (C/EST) in April 1997. "She mentioned that changes could be introduced by different people and at different stages in the process", adding that such changes could have been made "directly by C/EST, for recommendation to the Secretary General".

VIII. The Tribunal is satisfied that, in any case, the ultimate responsibility for the issuing of post descriptions belongs to the Secretary General of ICAO and that it is entirely up to his discretion to accept the suggestions that may be made by the persons with competence who are his advisers on this subject. The Tribunal is satisfied that the procedure of revision of PD1 was entirely regular and not vitiated by improper motivation and that the only valid description of the Applicant's post is that issued by the Secretary General, whether or not it was to the Applicant's liking and whether or not the Applicant signed it.

IX. Whatever the legal value of PD1, the Applicant based her case on two premises, one that PD1 reflected her real functions while PD2 did not, and that consequently she had been working under an inaccurate post description. In order to ascertain the correctness of that statement, and assuming that indeed PD1

accurately reflects her post functions, the Tribunal shall compare the two texts to see whether or not there are differences between them, and if such differences exist, whether or not they have any legal relevance. In fact, the only differences between the two post descriptions argued by the Applicant were those regarding supervision of the incumbent member. In PD1, Section 6, "Supervisory Controls", the language used depicts a task entirely free of supervision for routine affairs, and directs the incumbent to "discuss with the Supervisor" unusual cases. The total independence of the incumbent is expressed in the first sentence, where it is stated that "Work comes directly to the incumbent. ICAO members, of all levels, seek advice from the incumbent directly. Advice is given by the incumbent directly to the staff member." The same may be said of the last sentence, according to which "there is no revision or verification by the Supervisor".

On the other hand, PD2 presents a picture of very light supervision. According to the language used in the first sentence in Section 6, "Supervisory Controls", although work continues to come directly to the incumbent, *special requests may come from the supervisor.* Unusual cases are also discussed with the supervisor. However, in the last sentence, it is stated that "For routine work, supervision is *general and is at the discretion of the supervisor"* (emphasis added). And exceptional (not *unusual*) cases "are submitted to the Supervisor for review and decision". It must be pointed out that *general supervision* is the lower degree of supervision and that the Applicant cannot possibly claim to be under no supervision whatsoever.

X. In the appreciation of the Tribunal, the differences pointed out are too slight for them to have any legal significance. Moreover, they would have to bring some injury to the Applicant. The fact that PD2 describes a post with a slight emphasis on supervision while the Appellant maintains that, in actual life, such supervision depended entirely on her initiative does not seem to impose further responsibilities on the Applicant, on the contrary. If supervision did not come from where it should come, the responsibility for that failure is on the Administration, not on the incumbent. On the other hand, if she felt that a certain case was worth while consulting with her Supervisor, she could do so on her own initiative. That state of affairs is eloquently described by a sentence in PD1, stating that "The incumbent must be able to work independently, methodically, accurately and with attention to details, as there is no review or verification by the Supervisor". This sentence is

absent in PD2, as it is obvious that the less supervision there is, the more responsibility accrues for the incumbent.

XI. The Applicant and later the AJAB seem to put great emphasis on the fact that the Organization could not build up a structure up to the *theoretical* conception that they discover behind the subtle modifications in the supervision clauses. They proclaim that there was an obligation of the Respondent to act in accordance with that announcement in the job description, but in fact, if obligation there was, it was towards the Organization: it may be argued that it could have prejudiced the Organization if, really, supervision was necessary for the better performance of the functions assigned to the Travel Bureau. But this has nothing to do with the matter of the present case, which relates to an alleged injury to the Applicant.

XII. The Tribunal does not believe that the real issue is that as presented by the AJAB or even by the Appellant. The real grievance of the Appellant is that, with a text of the job description as it was finally drafted by the Director General, the post had in the estimation of the Applicant less chances of being reclassified as P3. Her insistence in that the post required more years of experience than was proposed by the Administration and that no supervision was necessary nor, indeed, actually exercised, in relation to the incumbent, was destined to make the post look as more important than the Administration presented it.

XIII. But even after obtaining the text that the Applicant wanted, it would still to be seen whether or not the Administration would have upgraded the post to the P-3 level. That possibility would have remained entirely in the realm of speculation, as it depended on the discretion of the Secretary General. On the other hand, neither the AJAB nor this Tribunal may substitute on this matter their judgment for that of the Secretary General. The Tribunal may find that the Secretary General's discretion was badly used, for instance if there was arbitrariness, discrimination against the Appellant or any other improper motivation, or if due process of law was not observed. The *onus probandi* falls entirely on the Applicant in these cases and the Tribunal is satisfied that the Applicant has offered no evidence in that respect.

XIV. For the reasons above exposed, the Application is rejected in its entirety.

(Signatures)

Julio **Barboza**
President

Omer Yousif **Bireedo**
Member

Brigitte **Stern**
Member

Geneva, 25 July 2003

Maritza **Struyvenberg**
Executive Secretary

SAAVEDRA